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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CRAIG D. LALLY,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,

Defendants and Respondents.

B189693

(Los Angeles County
Super. Ct. No. SC082734)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Richard P. Neidorf, Judge. Affirmed.

Armstrong & Armstrong and James J. Armstrong for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Defendants and Respondents.

Plaintiff Craig Lally appeals the judgment entered in his employment lawsuit following the trial court's grant of both a summary judgment motion and a motion for judgment on the pleadings. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a police officer employed by the Los Angeles Police Department at the rank of sergeant. He took an employment examination in order to qualify for promotion to the rank of lieutenant and, dissatisfied with his score, filed a formal protest challenging the results, alleging prejudice and fraud. After investigation, the City found no fraud or prejudice in the conduct of examination. Plaintiff then filed this lawsuit, naming as defendants the City of Los Angeles, Chief of Police William Bratton, Captain Sharyn Buck, Captain Fabian Lizarraga, and Donald Stief.

Defendants moved for summary judgment. The trial court denied the motion, stating two grounds: (1) the motion was served 73 days before the hearing date, and thus was untimely under Code of Civil Procedure section 437c, subdivision (a), which requires 75 days notice; and (2) there were triable issues of fact as to certain of the causes of action. The trial was thereafter moved from July to December, and defendants served and filed a second, timely motion for summary judgment, and for judgment on the pleadings.

At a hearing on those motions, the trial court granted the second motion for summary judgment in its entirety, granted the motion for judgment on the pleadings without leave to amend, and entered judgment for defendants.

Plaintiff appeals the judgment.

CONTENTIONS

In the trial court, plaintiff did not address the merits of either the summary judgment motion or the motion for judgment on the pleadings. Rather, he contended below, and continues to maintain on appeal, that neither motion was properly before the court, and thus should have been denied. Of course, the ruling on each motion

independently supports the judgment of dismissal; thus, in order to prevail on appeal, plaintiff must establish that both the summary judgment motion and the motion for judgment on the pleadings were fatally flawed.

DISCUSSION

1. *Motion for Summary Judgment*

Defendants' first motion for summary judgment and supporting papers (the "First MSJ") was served on May 13, 2005, 73 days before the July 25, 2005 hearing, which was scheduled to be held 30 days prior to the August 24, 2005 trial date. The trial court denied the motion on two grounds. First, the court ruled that although the motion was timely set for hearing 30 days before trial, it was untimely under section 437c, subdivision (a), because it was personally served only 73 days prior to the hearing date, and the trial court had no authority to shorten the statute's 75-day notice requirement. Said the court: "Defendants' MSJ is untimely under CCP 437c(a). The motion was personally served on May 13th, 2005, only 73 days prior to the hearing date, and on this basis alone the Court can and will and should deny the motion." The court also noted that because the motion was not brought in the alternative as a motion for summary adjudication and did not set forth arguments as to all causes of action, the defendants failed to meet their burden of showing that all causes of action have no merit by showing that each cause of action cannot be established and that there is a complete defense to them.

The trial date was thereafter continued to December 28, 2005. On September 9, 2005, defendants served by personal service a Notice of Motion for Summary Judgment or, in the Alternative, Motion for Summary Adjudication, and supporting papers (the "Second MSJ"). The Notice of Motion for the Second MSJ was filed on September 12, 2005 and set for hearing on November 23, 2005, 75 days after service and 35 days prior to the trial date.

Seven days later, defendants served and filed a Notice of Errata re Papers in Support of the Second MSJ ("Notice of Errata"). The Notice of Errata made no

substantive changes; it merely corrected the numbering of exhibit pages and presented the Separate Statement of Undisputed Facts in a more readable form. At the November hearing on the Second MSJ, plaintiff stated that he did not receive the Notice of Errata. Thus, his opposition to the Second MSJ did not reflect the changes made in the Notice of Errata.

In that opposition, plaintiff argued that the Second MSJ should be denied or continued pursuant to section 437c, subdivision (h) on the grounds that discovery was unfinished because the defendants' depositions had not been completed, notwithstanding that the discovery cut-off date had long since passed.

At the hearing on November 23, 2005, the trial court gave its tentative ruling, which was to grant the motion in its entirety. The court found that the separate statement originally filed with the Second MSJ on September 9, 2005 was not fatally defective, and that there was no basis for a denial of the motion pursuant to section 437c, subdivision (h), since the discovery cut-off was past. However, because plaintiff's counsel asserted that he did not receive the Notice of Errata, the trial court continued the hearing and permitted the plaintiff to file additional briefing regarding how that fact affected his ability to oppose the motion.

At the continued hearing on December 14, 2005, the trial court adopted its tentative ruling and granted the Second MSJ. The court ruled that plaintiff "failed to produce any evidence to dispute any of the Defendants' facts or to raise any triable issues." Indeed, plaintiff's counsel admitted at the hearing that the motion was opposed solely on procedural, not substantive, grounds.

Plaintiff complains that the trial court erred in failing to enforce the statutory notice requirements of Code of Civil Procedure section 437c. However, plaintiff does not and cannot argue that he did not have actual, extended notice of the grounds of defendants' motion. Upon receipt of the First MSJ and supporting papers on May 13, 2005, plaintiff was apprised of the reasons that defendants believed they were entitled to summary judgment. Rather than address those reasons, plaintiff chose to oppose defendants' motion on purely procedural grounds. When defendants corrected the

mistakes which had lead to the denial of their motion on procedural grounds by complying the notice requirements of Code of Civil Procedure section 437c, subdivision (h) and moving, alternatively, for summary adjudication of the facts, as suggested by the trial court, plaintiff again chose not to address the merits of defendants' position. Rather, at the November 23, 2005 hearing on the Second MSJ, plaintiff opposed the motion solely on the basis that he needed more time to complete discovery, even though he no longer had the ability to demand discovery because the discovery cut-off date had passed.

The purpose of the statutory notice requirements are to apprise the parties of the legal arguments upon which their adversaries are relying, not to provide fodder to a party who seeks to needlessly prolong unmeritorious litigation. The notice provided to plaintiff of defendants' Second SJM met both the letter and the spirit of the statute.

2. Motion for Judgment on the Pleadings

Code of Civil Procedure section 438, subdivision (e) provides: "No motion may be made pursuant to this section if a pretrial conference order has been entered pursuant to Section 575, or within 30 days of the date the action is initially set for trial, whichever is later, unless the court otherwise permits." Plaintiff relies on this 30 day time limitation to argue that defendants' motion for judgment on the pleadings was untimely, and therefore should have been denied.

"A motion for judgment on the pleadings may be made at any time either prior to the trial or at the trial itself. [Citation.]" Such motion may be made on the same ground as those supporting a general demurrer, i.e., that the pleading at issue fails to state facts sufficient to constitute a legally cognizable claim or defense. [Citation.]" (*Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, 650.)

Code of Civil Procedure section 438, subdivision (e) "authorizes the trial court to permit late filings of motions for judgment on the pleadings and does not specify any grounds which might serve to limit its power to do so." [Citations.] . . . The statute does not impose a 'good cause' requirement." (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1063.) Whether or not to permit the late filing of a motion for

judgment on the pleadings "'is a matter residing in the trial court's discretion to control litigation before it.' [Citation.] . . . The interests of all parties are advanced by avoiding a trial and reversal for defect in pleadings." (*Ibid.*)

In short, plaintiff is simply wrong when he argues that the trial court was not authorized to grant the motion for judgment on the pleadings.

DISPOSITION

The judgment is affirmed.

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ARMSTRONG, J.

I concur:

TURNER, P. J.

MOSK, J., Concurring

I concur.

I concur to discuss several points raised by plaintiff.

With respect to the first summary judgment motion, the trial court ruled, “Defendants’ motion for summary judgment is denied as the Court finds that there are triable issues of fact.”¹ It also denied the motion on the basis that the motion was, under Code of Civil Procedure section 437c, subdivision (a),² not timely served. Plaintiff contends that the second motion for summary judgment was not based on any new or different facts, circumstances, or law from the first summary judgment motion and was therefore precluded by sections 437c, subdivision (f)(2) and 1008, subdivision (b). Defendant points to the finding by the trial court in connection with the first summary judgment motion that there were triable issues of fact. This contention has some superficial merit. But, as the notice was defective, the trial court had no authority to rule on the first motion for summary judgment. (*McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 118 [no authority to shorten statutory notice provision].) Moreover, because plaintiff has not addressed the merits of the second summary judgment motion, there is no showing of any miscarriage of justice. (Cal. Const., art. VI, § 13.) “The burden is on the appellant in every case to show that error has resulted in a miscarriage of justice. [Citation.] Further, ‘appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice.’” (*County of Los Angeles v. Nobel Ins. Co.* (2000) 84 Cal.App.4th 939, 945.) Plaintiff has not met his burden here.

On appeal, plaintiff does not address the merits of summary judgment and the judgment on the pleadings motion. At the trial level, plaintiff primarily raised procedural issues. Plaintiff’s failure to raise in his briefs any issue as to the merits of the summary judgment motion and motion for judgment on the pleadings constitutes a waiver of those

¹ This conclusion was based on the defendants’ failure to address certain causes of action.

² All further references are to the Code of Civil Procedure, unless otherwise stated.

issues. (See *Livingston v. Marie Callenders, Inc.* (1999) 72 Cal.App.4th 830, 834.) Moreover, plaintiff's primary point at the trial level, other than procedural issues, was, in effect, directed at the admissibility of defendants' evidence. To the extent these were evidentiary objections, the failure to obtain a trial court ruling on them is a waiver of any such objection. (See *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564.)

The trial court did not abuse its discretion in not allowing plaintiff to amend his complaint because he did not explain how he could amend his complaint to state a cause of action. (See *Foundation For Taxpayer & Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal.App.4th 131, 135 [“Denial of leave to amend after granting a motion for judgment on the pleadings is reviewed for abuse of discretion. [Citation.]’ [Citation.] To show an abuse of discretion, the plaintiff has the burden of demonstrating that ‘there is a reasonable possibility the plaintiff could cure the defect with an amendment.’ [Citations.]”

Plaintiff complains about the form of the judgment and as to the inclusion of costs. Even if there were any procedural defects, they were forfeited because they were not brought to the attention of the trial court. According to the record, plaintiff did not address the proposed judgment or seek to tax costs at the trial court level.

For these reasons and the reasons set forth in the majority opinion, I concur that the judgment for defendant should be affirmed.

MOSK, J.